85-103

Office Supreme Court, U.S.
FILED
JUL 3 1985
ALEXANDER L. STEVAS,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-

GREAT LAKES DREDGE & DOCK COMPANY, INC.,
Petitioner,

v.

DEBORAH FURKA,
Administratrix of the Estate of PAUL FURKA, deceased,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

WARREN B. DALY, JR.
M. HAMILTON WHITMAN, JR.
1600 Maryland National Bank Bldg.
Baltimore, Maryland 21202
(301) 685-1120

Counsel for Petitioner

Ober, Kaler, Grimes & Shriver
Of Counsel
July 3, 1985

RCS Publishing Co., 5205 York Rd., Baltimore, Md. 21212

QUESTIONS PRESENTED

1. May a maritime rescuer be found contributorily negligent when his conduct, although neither wanton nor reckless, fails to conform to that of an ordinarily prudent person under the circumstances of the emergency?

2. Is it improper for an appellate court to invoke plain error and adopt a theory not advanced at trial when

(a) the instruction found deficient on appeal was in accord with the prevailing maritime law at the time of trial; and

(b) even under the instruction preferred by the appellate court, there was substantial evidence to support the jury's finding of 65 percent contributory negligence?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISION INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
A. The Decision Below Directly Conflicts With Decisions Of Other Courts Of Appeals As To The Standard For Assessing The Contributory Negligence Of A Maritime Rescuer	6
B. The Standard For Judging The Conduct Of A Maritime Rescuer Is An Important Question Of Federal Law Which Should Be Settled By This Court	8
C. The Decision Below Is In Conflict With A Decision Of This Court As To The Circumstances In Which Plain Error May Be Invoked	10
D. By Invoking Plain Error, The Fourth Circuit Departed From The Accepted Course Of Judicial Proceedings And Opened The Door To Abuse Of Appellate Procedure	11
CONCLUSION	13
APPENDIX	
Memorandum And Order Of The United States District Court For The District Of Maryland	App. 1
Judgment of the United States District Court for the District of Maryland	App. 4
Opinion and Order of the United States Court of Appeals for the Fourth Circuit	App. 6
Order of the United States Court of Appeals for the Fourth Circuit Denying Petitioner's Petition for Rehearing En Banc	App. 16

TABLE OF AUTHORITIES

Cases

	PAGE
Andrews v. Appalachian Electric Power Co., 192 Va. 150, 63 S.E.2d 750 (1951)	8
Asaro v. Parisi, 297 F.2d 859 (1st Cir.), *cert. denied*, 370 U.S. 904 (1962)	7
Brown v. National Oil Co., 233 S.C. 345, 105 S.E.2d 81 (1958)	8
City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981)	11
Corbin v. Philadelphia, 195 Pa. 461, 45 A. 1070 (1900)	8
Furka v. Great Lakes Dredge & Dock Co., 755 F.2d 1085 (4th Cir. 1985)	2, 4, 6, 10, 11, 12
Grigsby v. Coastal Marine Service of Texas, Inc., 412 F.2d 1011 (5th Cir. 1969), *cert. dismissed*, 396 U.S. 1033 (1970)	9-10
Hlodan v. Ohio Barge Line, Inc., 611 F.2d 71 (5th Cir. 1980)	6-7
Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970)	8
Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974)	8
Scott v. John H. Hampshire, Inc., 246 Md. 171, 227 A.2d 751 (1967)	8
Wagner v. International Railway Co., 232 N.Y. 176, 133 N.E. 437 (1921)	8

Statutes

28 U.S.C. § 1254(1) (1982)	2
28 U.S.C. § 1331 (1982)	4
28 U.S.C. § 1333 (1982)	4

PAGE

The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (1982) 10
The Jones Act, 46 U.S.C. § 688(a) (1982) 3, 6, 7, 8, 9, 10

Miscellaneous

Fed. R. Civ. P. 52(a) 12
Restatement of Torts § 470 (1934) 7
Restatement (Second) of Torts § 283 (1965) 7-8
Restatement (Second) of Torts § 296 (1965) 7-8
Restatement (Second) of Torts § 470 (1965) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-

GREAT LAKES DREDGE & DOCK COMPANY, INC.,
Petitioner,

v.

DEBORAH FURKA,
Administratrix of the Estate of PAUL FURKA, deceased,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Great Lakes Dredge & Dock Company, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on February 26, 1985.

OPINIONS BELOW

On February 21, 1983, at the conclusion of a five-day jury trial, the jury found defendant Great Lakes Dredge & Dock Company, Inc. (hereinafter Great Lakes)[1] negligent, found plaintiff's decedent Paul Furka 65 percent contributorily negligent and assessed damages at $1,200,000. On May 6, 1983, judgment was entered for $420,000. App. 4-5.[2]

On appeal, the judgment was reversed by the United States Court of Appeals for the Fourth Circuit on February 26, 1985. 755 F.2d 1085 (4th Cir. 1985); App. 6.

Great Lakes filed a timely Petition for Rehearing. That Petition was denied by Order dated April 5, 1985. App. 16.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit, reversing the judgment below and remanding the matter for new trial, was dated February 26, 1985.

The Order of the United States Court of Appeals for the Fourth Circuit denying Great Lakes' Petition for Rehearing was entered on April 5, 1985. This Petition is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

---

[1] Great Lakes Dredge & Dock Co. is a subsidiary of Great Lakes International, Inc. Other subsidiaries of Great Lakes International are Henry DuBois' Sons Company, Inc., Western Quarries and Construction Company, North American Trailing Company (NATCO), Lydon Dredging & Construction Company, Ltd., Great Lakes Nederland, B.V., Great Lakes Argentina S.A., Tidewater Dredging Corporation, Dodge Island Corporation, and Fifty-Three Dredging Corporation. Great Lakes International is also a joint venturer in the following groups: Polar Constructors and GL-CFB, Joint Venture.

[2] References to material in the Appendix to this Petition are designated "App. _____."

STATUTORY PROVISION INVOLVED

1. The Jones Act, 46 U.S.C. § 688(a) (1982):

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

STATEMENT OF THE CASE

Paul Furka was employed by Great Lakes as a surveyor on a large marine construction project at Hart and Miller Islands in the Chesapeake Bay near Baltimore. Workmen on the project, including Furka, worked on and around a large dike being built to hold material dredged from nearby shipping channels. Late on the afternoon of January 9, 1982, Furka boarded a Boston Whaler[3] assigned to another work crew and proceeded out to one of the large scows used to bring rock from a quarry to the work site. His motives for doing so were disputed. Mrs. Furka maintained at trial and on appeal that her husband was on a mission to rescue the crewman on the scow, which was then adrift because its attending tug had suddenly lost both steering and propulsion.

---

[3] This Boston Whaler was a 16-foot open, flat bottomed fiberglass boat, powered by a 35-horsepower outboard motor.

A. 457, 473, 492.[4] Great Lakes maintained that Furka went out to bring the scowman in out of the cold and to have him on the dike in time for a crew change.

When Furka arrived at the scow, the scowman declined his offer of a ride. A. 89, 262. Furka could then have gone aboard the tug. A. 461. However, after talking to its crew, he headed back to the dike aboard the Whaler. A few minutes later, Furka radioed to report that he was taking on water and was not going to make it back to the dike. Furka was not heard from again. His body was recovered several weeks later.

Mrs. Furka subsequently filed suit in the United States District Court for the District of Maryland, alleging negligence under the Jones Act and unseaworthiness under the General Maritime Law. Juridiction in the district court was based on 28 U.S.C. §§ 1331 and 1333 (1982). A jury trial commenced on February 15, 1983. At trial, there was considerable evidence on the question of the circumstances that led Furka to venture out to the scow. Plaintiff relied primarily on a radio conversation during which the tug captain was alleged to have said that the scowman was "freezing to death" and in need of immediate removal from the scow. 755 F.2d at 1087; App. 7. Great Lakes' evidence was to the contrary.

There was testimony that while the weather was beginning to worsen at the time that Furka set out in the Whaler, the scowman was dressed for the cold, A. 359, and could get behind the coamings to stay protected from the wind and spray. A. 225-26, 459; T. 285.[5] While the scowman may have been cold, he was not freezing, A. 459, nor was his life in jeopardy. T. 281-82. A small kerosene stove aboard the tug provided heat. A. 459. While the tug was alongside the rock scow at one point, the tug captain asked the scowman to come aboard the tug. The scowman declined, however. A. 458. He did not seem to be in any distress or particular danger at that point. A. 459.

---

[4] Citations to the Joint Appendix filed in the Fourth Circuit are designated "A. _____."

[5] References to material in the trial transcipt not contained in the Joint Appendix below are designated "T. _____."

The tug captain denied having reported over the radio that the scowman was freezing to death or that an emergency existed, *id.*, and others listening to the radio did not perceive any emergency. A. 281-82, 452-53. The foreman of the dike construction crew understood the purpose of Furka's mission to be to warm up the scowman by giving him some hot soup, A. 221-24, 438, while an independent inspector listening to the radio heard Furka say that he was going out to get the scowman because it was nearly time to change crews. A. 88-89, 96-97.

Substantial evidence was presented at trial to establish Furka's contributory negligence. The tug captain and his deckhand expressed surprise at the arrival of the Whaler. A. 351-52, 358, 363-64. At that time, it was the captain's opinion that it was too rough for the safe operation of that Whaler on the bay, A. 460, a judgment which was shared by the scowman, who declined a ride on the Whaler, A. 89, 262, and by witnesses on the dike. A. 221, 292, 438. Arrangements had been made by the tug captain to have another Great Lakes workboat assist his disabled tug and scow as soon as the other boat finished a task it was engaged in. A. 220, 252, 364, 457-58. Moreover, had an emergency existed, yet another workboat in the vicinity, assigned to transport independent inspectors, could have been summoned. A. 332-35, 444-45. No one called that vessel for emergency assistance until after Furka radioed that he was in trouble. A. 332.

There was further evidence that Furka was contributorily negligent not only in venturing out in the Whaler in the first place, but also in attempting to return to the dike after having arrived safely alongside the tug. After the scowman declined his offer of a ride, Furka tied the Whaler up alongside the tug. A. 352. The tug was in the lee of the scow, thus affording both tug and Whaler some protection from the wind and seas. A. 358. Furka could have stepped aboard the tug and waited for a larger boat rather than attempting to return to the dike in the Whaler. A. 461. Had Furka stayed aboard the tug with the captain and his deckhand, he, like they, would have been brought ashore without incident.

At the conclusion of the evidence, the jury returned a verdict finding Great Lakes negligent, the Boston Whaler seaworthy, Paul Furka 65 percent contributorily negligent, and damages of $1,200,000. On May 6, 1983, the trial court denied Great Lakes' affirmative defense of limitation of liability and entered judgment in favor of Mrs. Furka for $420,000. App. 1-5.

Mrs. Furka appealed on several grounds. In an opinion dated February 26, 1985, the United States Court of Appeals for the Fourth Circuit reversed the judgment based on perceived "plain error" of the district judge in charging the jury on the standard to be applied in assessing Paul Furka's contributory negligence. The case was remanded for a new trial. Following denial of its Petition for Rehearing on April 5, 1985, App. 16, Petitioner filed this Petition.

REASONS FOR GRANTING THE WRIT

A. *The Decision Below Directly Conflicts With Decisions Of Other Courts Of Appeals As To The Standard For Assessing The Contributory Negligence Of A Maritime Rescuer.*

The district judge charged the jury that Furka should be found contributorily negligent if they concluded he had failed "to use ordinary care under the circumstances for his own safety at the time and place in question." 755 F.2d at 1088 n.5; App. 9. The Fourth Circuit held that charge to be error, ruling instead that if Paul Furka was engaged in a rescue mission, "there must be evidence of wanton or reckless behavior on [his] part before any fault may be assigned." 755 F.2d at 1088; App. 9. By adopting the "wanton and reckless" standard, the Fourth Circuit placed itself directly in conflict with *Hlodan v. Ohio Barge Line, Inc.*, 611 F.2d 71 (5th Cir. 1980).

Hlodan, a Jones Act seaman, drowned in the Mississippi River while attempting to rescue a deckhand who had fallen from an assisting tug. The trial court, in instructing on

contributory negligence, used the term "extraordinary negligence." *Id.* at 73. The Fifth Circuit agreed that use of the word "extraordinary" was inadvisable, but stated:

> Considering the charge as a whole, however, we find that the district court properly delineated the requirement for Hlodan's conduct under the rescue doctrine to be that of an "ordinarily prudent person under the circumstances."

Id. In the following paragraph, the Fifth Circuit reaffirmed this standard:

> It was for the jury, not the court, to decide whether Hlodan acted as an ordinary [sic] prudent person should have acted under the emergency circumstances as shown by the evidence in this case.

Id. at 74.

The contributory negligence of a Jones Act rescuer was also discussed in *Asaro v. Parisi*, 297 F.2d 859 (1st Cir.), *cert. denied*, 370 U.S. 904 (1962). Plaintiff there had argued that he could not be contributorily negligent in attempting a rescue. The First Circuit disagreed, stating:

> The fact that one acts in an emergency he has not caused, even to save another from danger, is only a factor or circumstance to be considered in determining due care, it being quite naturally assumed that the ordinary man of average prudence would not and could not reasonably be expected to act under tension with the same care, forethought and deliberation as ought to be expected of such a person when not acting under stress.

Id. at 861-62. In discussing the appropriate standard, the First Circuit cited Restatement of Torts § 470 (1934), which concerns contributory negligence in an emergency. Comment "a" to Restatement (Second) of Torts § 470 (1965) incorporates the comments of § 296, which discusses the significance of an emergency in assessing a defendant's conduct:

> "[T]he standard of conduct to which [an actor] must conform is that of a reasonable man under like circumstances." Among the circumstances which must be taken into account is the fact that the actor is confronted with such an emergency as is described in this Section.

Restatement (Second) of Torts § 296 (1965), comment b, *quoting* Restatement (Second) of Torts § 283 (1965). The rule adopted by the Fourth Circuit below conflicts directly with this standard.

B. *The Standard For Judging The Conduct Of A Maritime Rescuer Is An Important Question Of Federal Law Which Should Be Settled By This Court.*

The opinion below raised important questions relating to federal maritime law by its reliance on state court opinions concerning the rescue doctrine.[6] Of course, courts exercising maritime jurisdiction have occasionally looked to state law for guidance in the development of new aspects of federal maritime law. *See, e.g., Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 408 (1970); *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 586-87 (1974). But never has this Court adopted maritime rules based upon land-based legal principles which contravene underlying federal maritime policies. Such would be the case here if the opinion below is permitted to stand.

Federal maritime law has long applied comparative negligence, reducing a plaintiff's recovery proportionately to his own fault but not denying any recovery merely because a plaintiff's own negligence contributed to his injuries. Thus, in suits under the Jones Act, a plaintiff's contributory negligence has always resulted in a proportionate reduction of his award, rather than a bar. Conversely, each of the opinions relied upon by the Fourth Circuit as authority for its "wanton and reckless" standard arose from a jurisdiction in which, at the time of the opinion, the plaintiff's contributory

---

[6] The Fourth Circuit cited the following cases as authority for the proposition that the "wanton or reckless" standard is "traditionally applied to the conduct of plaintiffs in rescue situations:" *Scott v. John H. Hampshire, Inc.*, 246 Md. 171, 227 A.2d 751, 753-54 (1967); *Brown v. National Oil Co.*, 233 S.C. 345, 105 S.E.2d 81, 87 (1958); *Andrews v. Appalachian Electric Power Co.*, 192 Va. 150, 63 S.E.2d 750, 757 (1951); *Wagner v. International Railway Co.*, 232 N.Y. 176, 133 N.E. 437, 438 (1921); *Corbin v. Philadelphia*, 195 Pa. 461, 45 A. 1070, 1073 (1900). 755 F.2d at 1088; App. 10.

negligence barred any recovery. Since rescuers almost invariably face some danger to which they would not reasonably otherwise subject themselves, application of the rescue doctrine in such jurisdictions served the salutory purpose of recognizing that the act of exposing oneself to danger to effect a rescue should not, of itself, preclude recovery. However, where, as in admiralty, the plaintiff's contributory negligence merely reduces his recovery, there is no need for such a rule.

The "wanton or reckless" rule adopted below would, in fact, disturb the traditional handling of Jones Act cases. The Jones Act specifically provides for trial by jury, and one key duty of a Jones Act jury is to ascertain the relative faults of the seaman and his employer. This system has worked sufficiently well since 1920 that Congress has never seen fit to modify it. The opinion below seriously undermines this important trial function.

Without providing any guidance as to what might constitute a rescue and thereby trigger application of its rule, the Fourth Circuit directed that a seaman engaged in rescue within its jurisdictional waters could not be contributorily negligent unless his actions were wanton or reckless. Apparently, a seaman going to the rescue could be grossly negligent, but not slightly negligent. Would a jury finding of 20 percent contributorily negligence be possible under a "wanton or reckless" charge? Presumably not. The effect, then, of the opinion below is to take from the jury its traditional role of balancing and assessing the conduct of a seaman and his employer for the purpose of assigning relative degrees of fault. The implication of the opinion below is not that a rescuer's degree of negligence will be assessed in light of the emergency presented, but that his negligence will be *excused* unless "wanton or reckless." Such was never the maritime law.

To support its decision, the Fourth Circuit relied on *Grigsby v. Coastal Marine Service of Texas, Inc.*, 412 F.2d 1011 (5th Cir. 1969), *cert. dismissed*, 396 U.S. 1033 (1970). *See* 755 F.2d at 1089-90; App. 10, 12-13. Reference to

Grigsby is important for two reasons. First, it emphasizes that maritime rescues are to be encouraged. Indeed, the frequency with which seamen are called upon to aid others in distress is a significant reason for granting the writ in the instant case. Secondly, however, the opinion below misapplied *Grigsby*, thereby confusing the standards for maritime rescuers and inviting untold further conflicts.

Grigsby, insofar as it pertained to rescue, was a "status" case. It held that a shoreside worker, prior to the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (1982), became a *Sieracki* seaman when he boarded a vessel for the purpose of rescue and, thus, obtained the benefits of the shipowner's warranty of seaworthiness. It did not discuss the "rescue doctrine" or the standard to be used in assessing the contributory negligence of a maritime rescuer. *Grigsby* was inapposite to the evaluation of Paul Furka's conduct, since his status as a seaman was determined by the jury under Jones Act standards. The extension or *Grigsby's* status test to the standard of care demanded of a maritime rescuer was improper, and this Court should prohibit similar future misapplications.

Finally, the error of the Fourth Circuit is important in this case, as it controlled the result. If the panel below erred in adopting its "wanton and reckless" standard, retrial of this case is unnecessary, and affirmance of the jury verdict entered for plaintiff is appropriate.

C. *The Decision Below Is In Conflict With A Decision Of This Court As To The Circumstances In Which Plain Error May be Invoked.*

The Fourth Circuit conceded that counsel for Mrs. Furka had failed to raise the "rescue doctrine" in the trial court, 755 F.2d at 1089; App. 11, but circumvented that deficiency by invoking "plain error." *Id.* The perceived error was the trial judge's failure to instruct on the "wanton and reckless"

standard announced by the Fourth Circuit on appeal. The Fourth Circuit neither cited maritime authority for adoption of such a standard nor addressed prior authority to the contrary.[7]

This Court, in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981), noted that no plain error could result when the substantive principles at issue were in a state of uncertainty. Accordingly, plain error could hardly result from a jury charge in full accord with the only maritime precedents then in existence.

D. *By Invoking Plain Error, The Fourth Circuit Departed From The Accepted Course Of Judicial Proceedings And Opened The Door To Abuse Of Appellate Procedure.*

By invoking plain error in this case, the Fourth Circuit not only did a disservice to the parties and the trial court but also created a dangerously expansive view of the role of appellate courts, a view which threatens the interests of future litigants. As the Fourth Circuit recognized, plain error may only be invoked where the error, in addition to being "plain," results in fundamental injustice. 755 F.2d at 1089; App. 11. As previously discussed, the error in this case was not "plain." Trial judges will face a hopeless task in charging juries if they must anticipate new pronouncements of law by the appellate courts on matters not addressed by the litigants. To know the law is one thing; to be clairvoyant quite another.

Even were the error "plain," however, it cannot be said that fundamental injustice resulted. As this Court noted, the role of plain error is to correct "obvious instances of injustice. . . ." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. at 256. The parties here presented two radically different theories of the case to the jury below. Plaintiff claimed that Paul Furka was on a rescue mission while Great Lakes argued that he had merely gone out to bring the scowman in for some hot soup and the next crew boat. Under Great Lakes' view of the case, there was no emergency and no rescue.

---

[7] See pp. 6-8, *supra*.

The jury, charged to determine the negligence of Paul Furka "under the circumstances . . . at the time and place in question," 755 F.2d at 1088 n.5., App. 9, found him 65 percent contributorily negligent. Such an extraordinarily high degree of contributory fault could mean only one of two things: the jury either adopted Great Lakes' theory that there was no rescue or concluded that his conduct was altogether unreasonable in light of the circumstances then existing. Such a finding most probably equates to reckless conduct. Thus, even assuming *arguendo* that the "wanton or reckless" standard was proper, the jury finding of 65 percent contributory negligence cannot rationally be said to have been fundamentally unjust.

To conclude that a fundamental injustice occurred, the Fourth Circuit substituted its judgment for the jury's. Its opinion suggested as much. Noting first that "[w]hether or not there was a rescue attempt is, of course, a question for the jury[,]" *id.* at 1088; App. 9, the panel then declared that "[t]his was a rescue attempt that ended in tragedy." *Id.* at 1089; App. 10. Under the guise of plain error, the Fourth Circuit improperly rejected a jury finding based on substantial evidence in violation of Fed. R. Civ. P. 52(a).

The adversary system so important to our process of adjudication cannot function if appellate courts feel free, as did the court below, to present new legal theories on points not raised below and to override the conscientious and rational deliberations of the jury. The adversary system was efficiently at work in the trial court. Attempting to avoid any proportionate reduction of damages through a finding of contributory negligence, counsel for Mrs. Furka argued throughout trial that decedent was responding to an order and hence could not be found contributorily negligent as a matter of law. Counsel, who was exceedingly experienced in cases of this type, did not suggest any alternative instruction on contributory negligence. Unfortunately for plaintiff, her trial strategy went awry. The interests of finality and judicial economy compel the conclusion that Mrs. Furka should not now be awarded a second trial.

The action of the appellate court also opens the door to abuse by trial counsel of the "plain error" rule. When a case appears to be going badly, counsel may deliberately decline to raise key theories before the trial judge, only to argue on appeal that plain error was committed, thereby warranting a new trial, because the trial judge failed to anticipate novel theories *sua sponte*. Such a result would only further swell the tides of appellate litigation against which the courts of appeals, and this Court, are now battling.

These questions of judicial administration are of great importance to trial counsel and trial judges throughout the country, and this Court should address itself to the appellate courts' invocation of plain error in circumstances similar to those here presented.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

WARREN B. DALY, JR.
M. HAMILTON WHITMAN, JR.
1600 Maryland National Bank Bldg.
Baltimore, Maryland 21202
(301) 685-1120

Counsel for Petitioner

Ober, Kaler, Grimes & Shriver
Of Counsel
July 3, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DEBORAH FURKA, et al	*	
v.	*	CIVIL NO. Y-82-1411
GREAT LAKES DREDGE & DOCK COMPANY, INC.	*	
Filed: May 6, 1983	*	

Leonard C. Jaques, Esquire, Detroit, Michigan, and John J. Kelley, Esquire, Baltimore, Maryland, counsel for the plaintiffs.

Warren B. Daly, Jr., Esquire, Baltimore, Maryland, and M. Hamilton Whitman, Jr., Esquire, Baltimore, Maryland, counsel for the defendant.

YOUNG, United States District Judge

MEMORANDUM AND ORDER

Plaintiffs brought this suit alleging that plaintiffs' decedent died as a result of defendant's negligence and the unseaworthiness of defendant's vessel. After a five day jury trial, the jury returned a verdict finding that: 1) defendant's negligence caused or contributed to the death of plaintiffs' decedent; 2) defendant's vessel was seaworthy; 3) plaintiffs' decedent was 65% contributorily negligent and 4) $1.2 million was appropriate compensation for the death of plaintiffs' decedent which, when discounted by 65%, results in a verdict of $420,000 in favor of the plaintiffs.

Now, for the first time, defendant seeks a ruling on its affirmative defense of limitations of liability. Defendant's decision to wait until after the jury returned its verdict to raise the limitation issue smacks of an effort to get "two bites at the apple." The limitation issue which is a purely factual question of whether defendant's negligence was with or without the

"privity or knowledge" of the defendant could have and should have been submitted to the jury. *See Red Star Towing & Transportation Co. v. Ming Giant*, 552 F. Supp. 367, 371-72 (S.D. N.Y. 1982); *Doughty v. Nebel Towing Co.*, 270 F. Supp. 957 (E.D. La. 1967).

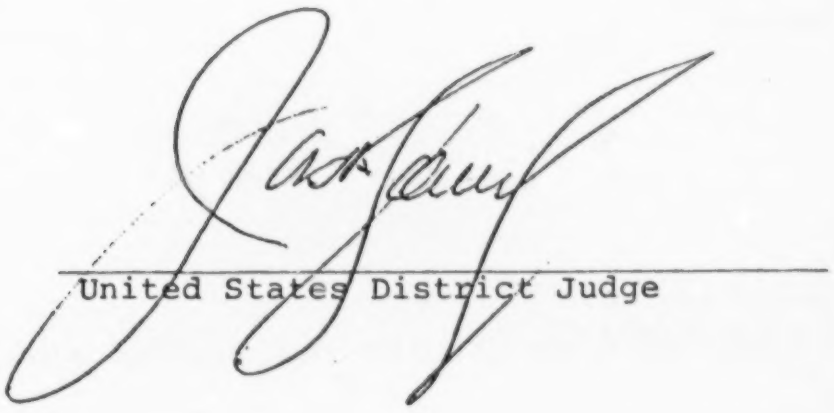
The jury's finding that defendant's negligence caused or contributed to the death of plaintiffs' decedent is binding on this Court. *In re Brasea*, 583 F.2d 736, 738 (5th Cir. 1978). However, contrary to plaintiffs' contention, the Court is not required to deny limitation if defendant's negligence was with the knowledge or privity of the defendant under any of the theories of negligence put forth by plaintiffs at trial. *In re Brasea*, 583 F.2d at 738; *Murray v. New York Central Railroad Co.*, 287 F.2d 152, 154 (2d Cir. 1961). Rather, the Court must determine which of the various theories of negligence put forth by the plaintiffs caused or contributed to the death of plaintiffs' decedent and whether under that theory or theories defendant's negligence was with or without privity or knowledge. *Id.*

The Court finds as a fact that among the theories of negligence that caused or contributed to the death of plaintiffs' decedent were: 1) the failure of defendant's managerial and supervisory personnel to heed the weather forecasts by closing down defendant's operation prior to the time that plaintiffs' decedent embarked on his ill-fated "rescue" mission; and 2) the failure of defendant's managerial and supervisory personnel to establish and implement safety procedures for dealing with blizzardy weather conditions. Since under either of these theories defendant's negligence was with the knowledge and privity of the defendant, *Hogge v. SS Yorkmar*, 434 F. Supp. 714, 739 (D. Md. 1977), the Court will deny defendant's affirmative defense of limitation of liability.

For the reasons stated herein, it is this 6th day of May, 1983, by the United States District Court for the District of Maryland, ORDERED:

1. That defendant's affirmative defense of limitation of liability BE, and the same IS, hereby DENIED; and

2. That judgment BE, and the same IS, hereby ENTERED in favor the plaintiffs in the amount of $420,000.



United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DEBORAH FURKA, Administatrix of the Estate of PAUL FURKA, Deceased	* * *	
v.	*	CIVIL NO. Y-82-1411
GREAT LAKES DREDGE & DOCK COMPANY, INC.	* *	

* * * * * * * * * * *

JUDGMENT

The above entitled case came before the Court, Honorable Joseph H. Young, presiding, and a Jury for the purpose of trial on February 15, 1983; on February 18, 1983, at the conclusion of the plaintiff's case in chief, a motion was made by defendant for Directed Verdict, and following argument of counsel for the respective parties said motion was granted by the Court as to punitive damages and denied by the Court in all other respects; on February 21, 1983, following the conclusion of all the evidence, argument of counsel and the Court's Charge to the Jury, the case was submitted to the Jury for its consideration, and after deliberating, the Jury returned its Verdict on February 22, 1983; it is, therefore, in accordance with the Verdict of the Jury and the Memorandum and Order of the Court dated May 6, 1983,

ORDERED AND ADJUDGED:

That Judgment be, and the same is, hereby entered in favor of plaintiff against defendant in the amount of Four Hundred Twenty Thousand Dollars ($420,000.00), and Costs.

Dated at Baltimore, Maryland this 6th day of May, 1983.

PAUL R. SCHLITZ, Clerk

BY: R. Bruce McElhone

R. Bruce McElhone
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-1542

DEBORAH FURKA, Administratrix of the Estate of Paul Furka, deceased,

Appellant,

versus

Great Lakes Dredge & Dock Company, Inc.,

Appellee

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, District Judge. (C/A 82-1411)

Argued: December 5, 1984 Decided: February 26, 1985

Before RUSSEL, PHILLIPS and WILKINSON, Circuit Judges.

Leonard C. Jaques (The Jaques Admiralty Law Firm, P.C. on brief) for Appellant; Warren B. Daly, Jr. (M. Hamilton Whitman, Jr.; Ober, Kaler, Grimes & Shriver on brief) for Appellee.

WILKINSON, Circuit Judge:

This is an action brought for negligence under the Jones Act and for unseaworthiness under general maritime law involving an alleged rescue attempt by appellant's decedent of a fellow employee on the Chesapeake Bay. During that attempt, the would-be rescuer was swept by the waves from his boat and drowned. We hold that the trial court's failure to give a proper rescue charge to the jury constitutes plain error and requires reversal despite a failure of counsel to object to the charge in accordance with Fed.R.Civ.P. 51. We remand the case for a new trial in accordance with the guidelines set forth below.

Appellant Deborah Furka is the widow of Paul Furka ("Furka"), who was employed by appellee Great Lakes Dredge and Dock Company ("Great Lakes") as a surveyor on a large marine dike construction project at Hart and Miller Islands in the Chesapeake Bay near Baltimore. In addition to a hydraulic dredge and two crew boats, Great Lakes maintained a number of tugboats, scows, and Boston Whalers to perform various functions on and around the project. Furka was chief-of-party on a surveying team operating on a Boston Whaler.

On January 9, 1982, a day of increasingly rough weather and turbulent seas, one of the tugs, with scow attached, lost its rudder and its power and went adrift in the bay. The captain radioed to base, but exactly what he said is a matter of dispute. According to plaintiff, the message was a call to remove the scowman from his open boat, where he was cold and wet and "freezing to death." Defendant's evidence indicated that the captain suggested no emergency but merely requested assistance with moving the scow. At the time of the call, none of the larger boats was available to go to the disabled craft. Furka took his sixteen-foot Boston Whaler into the rough water to remove the scowman from the cold, but the stranded seaman refused to leave with him. Furka turned toward shore but shortly began taking on water. He radioed for help but was drowned before rescuers could reach him.[1]

---

[1] The tug captain and scowman were eventually picked up by the inspector's boat.

Furka's widow brought this action against his employer, alleging negligence under the Jones Act, 46 U.S.C. § 688 (1982) [2] and the unseaworthiness of the Boston Whaler under general maritime law.[3] Great Lakes denied any immediacy to the tugboat captain's radio call for help and asserted contributory negligence as a limitation upon complete recovery.[4]

The jury found Furka to have been a seaman. It returned a verdict in favor of plaintiff on negligence and against plaintiff on the unseaworthiness of the Boston Whaler. It awarded damages for pecuniary loss of $1,200,000, but found Furka to have been 65% contributorily negligent. Judgment was thus entered for plaintiff in the amount of $420,000. From that verdict Mrs. Furka appealed.

I

The submission to the jury of the question of Furka's contributory negligence without reference to the special context of rescue ignored the very premise upon which appellant's case was based. The instruction in this case failed to inform

---

[2] 46 U.S.C. § 688(a) provides, in relevant part: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury . . . and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury. . . ."

[3] General maritime law imposes a duty upon shipowners to provide seaworthy vessels – that is, vessels reasonably fit for their intended use. This duty extends to the vessel itself, its equipment, and its crew. It is an absolute duty requiring no knowledge on the part of the shipowner and exists independently of the duty to exercise reasonable care under the Jones Act. *See Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494 (1971); *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960).

[4] Contributory negligence may not be asserted as a complete bar to recovery under either the Jones Act or an action for unseaworthiness, though it may be taken into account to mitigate damages. *Socony-Vacuum Co. v. Smith*, 305 U.S. 424 (1939).

the jury that no contributory negligence may be inferred from a rescue attempt alone and further that no comparative fault may be assessed unless plaintiff's conduct was wanton or reckless.[5] As stated long ago by Justice Cardozo, "Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore the reactions of the mind in tracing conduct to its consequences. It recognizes them as normal." *Warner v. International Ry. Co.*, 232 N.Y. 176, 133 N.E. 437 (1921).

The common law doctrine of rescue may be succintly stated: "[T]he law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness." *Scott v. John H. Hampshire, Inc.*, 246 Md. 204, 227 A.2d 751, 753-754 (1967), *quoting Maryland Steel Co. v. Marney*, 88 Md. 482, 42 A. 60, 66 (1898). *See also Altamuro v. Milner Hotel, Inc.*, 540 F. Supp. 870 (E.D. Pa. 1982); *Brown v. National Oil Co.*, 233 S.C. 354, 105 S.E.2d 81 (1958); *Andrews v. Appalachian Electric Power Co.*, 192 Va. 150, 63 S.E.2d 750 (1951). When confronted with an emergency, a rescuer "should not be charged with the consequences of errors of judgment resulting from the excitement and confusion of the moment. . . ." *Corbin v. Philadelphia*, 195 Pa. 461, 45 A. 1070, 1074 (1900); *see also Rodgers v. Carter*, 266 N.C. 564, 146 S.E.2d 810 (1966); Restatement (Second) of Torts § 470(1) (1965). In rescue, promptness may be prudence, and reflex may claim the seat of reason.

Whether or not there was a rescue attempt is, of course, a question for the jury. If the jury finds plaintiff engaged in a rescue, there must be evidence of wanton or reckless behavior on plaintiff's part before any fault may be assigned.

---

[5] The trial court simply instructed the jury: "Contributory negligence is a failure on the part of the plaintiff himself to use ordinary care under the circumstances for his own safety at the time and place in question. . . . The law requires that Paul Furka use ordinary care for his own safety. Failure to do so would be negligence on his part. . . ."

This is the standard traditionally applied to the conduct of plaintiffs in rescue situations. *See, e.g., Scott v. John H. Hampshire, Inc.,* (standard of "dangerous but not reckless" behavior), 227 A.2d 751, 753, *citing Maryland Steel Co. v. Marney,* 42 A. 60, 66 ("rashness"); *Brown v. National Oil Co.* ("wanton or foolhardy"), 105 S.E.2d 81, 87; *Andrews v. Appalachian Electric Power Co.* ("rash" or "reckless"), 63 S.E.2d 750, 757; *Wagner v. International Ry.* ("wanton"), 133 N.E. 437, 438; *Corbin v. Philadelphia* ("rashness and imprudence"), 45 A. 1070, 1073.

We reject appellee's contention that these policies lose their force under the Jones Act, where the doctrine of comparative negligence applies damages proportionately. It is true that the "wanton and reckless" standard developed under the common law, where contributory negligence was a complete bar to recovery. In some comparative negligence jurisdictions, not in admiralty, the wanton and reckless standard has thus been diluted. *See e.g., Cords v. Anderson,* 80 Wis.2d 525, 259 N.W.2d 672, 683 (1977); *Ryder Truck Rental, Inc. v. Korte,* 357 S.2d 228 (Fla. App. 1978). We do not think that is the appropriate course here. Rather, we agree with the Fifth Circuit that "of all branches of jurisprudence, the admiralty must be the one must hospitable to the impulses of man and law to save life and limb and property." *Gribsby v. Coastal Marine Service of Texas, Inc.,* 412 F.2d 1011, 1021 (5th Cir. 1969), *cert. dismissed,* 396 U.S. 1033 (1970). *See also Hlodan v. Ohio Barge Line, Inc.,* 611 F.2d 71 (5th Cir. 1980); *Asaro v. Parisi,* 297 F.2d 859 (1st Cir.), *cert. denied,* 370 U.S. 904 (1962). The best traditions of seafaring men demand that we honor attempts to rescue, unless the rescuer acts beyond the bounds that even the exigencies of the moment would allow. The wanton and reckless standard reflects the value society places upon rescue as much as any desire to avoid a total defeat of recovery under common law. Law must encourage an environment where human instinct is not insular but responds to the plight of another in peril.

This was a rescue attempt that ended in tragedy. Paul Furka died. If Sal Sanzone, the seaman on the open scow, had entered the Boston Whaler with Furka, he might have perished, too.

Some rescue attempts will involve the loss both of rescuer and victim. This does not displace the principles herein. Hazard inheres in the enterprise. A jury, assessing the situation at a time and place far removed, must give proper weight to the moment of peril and the humane instincts that prompted the response thereto.

II

Appellee contends that the trial court's contributory negligence charge is not subject to question here because appellant failed to object to the charge as given, pursuant to Fed.R.Civ.P. 51.[6] Ordinarily this court will not consider issues not previously raised. *United States v. One 1971 Mercedes Benz*, 542 F.2d 912 (4th Cir. 1976). However, if the error is "plain" and to ignore it would result in a denial of fundamental justice, it should be corrected. *United States v. Barge Shamrock*, 635 F.2d 1108, 1111 (4th Cir. 1980), *cert. denied sub nom. Shell Oil Co. v. United States*, 454 U.S. 830 (1981). "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941). *See also* 9 C. Wright & A. Miller, Federal Practice and Procedure § 2558 at 672-675 (1971).

In the case before us, the call to rescue and its attendant circumstances were the soul of appellant's case. Her evidence was adduced to show that had it not been for the perceived need for assistance, Furka would never have set out on the

---

[6] Fed.R.Civ.P. 51 provides, in relevant part, "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

turbulent bay in a sixteen-foot boat. Under the rescue doctrine, she was entitled to a special instruction regarding these circumstances. This court has found plain error requiring reversal where an instruction "plainly misstated fundamentally controlling substantive principles governing . . . [the] right to recover." *Miller v. Premier Corp.*, 608 F.2d 973, 983 (4th Cir. 1979); *see also Edwards v. Mayes*, 385 F.2d 369 (4th Cir. 1967). The trial court's failure to give a special rescue instruction here amounted to such a misstatement.

Counsel's failure to request the instruction on rescue seems attributable to his erroneous belief that a contributory fault charge, even one modified by the rescue doctrine, did not belong in this case. Under such circumstances, the usual course is to charge counsel with error, not the district court. In those rare circumstances where an appellate court does find "plain error," it is not to excuse counsel's lack of knowledge or errors of judgment, but to encourage courts in their role as ministers of manifest justice in the case.

III

Appellant also raises for the first time on appeal the issue of unseaworthiness of the disabled tug and scow,[7] a claim based upon the tug's faulty rudder and loss of power, upon the lack of radio communication between the two boats, and upon the absence on either vessel of an anchor or a life-saving skiff. This question implicates a second prong of the rescue doctrine, *viz.*, that the violation of a duty to one who is

---

[7] The significance of the ability to raise this claim is that a finding of unseaworthiness permits a plaintiff to recover in damages both pecuniary losses, including loss of support and funeral expenses, and nonpecuniary losses, notably loss of society. Under the Jones Act, only pecuniary losses (primarily loss of support and decedent's pain and suffering) are recoverable. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 587-591 (1974); *In re Merry Shipping*, 650 F.2d 622, 623-624 (5th Cir. 1981).

imperiled is also a violation of duty to the rescuer. *Altamuro v. Milner Hotel, Inc.*, 540 F. Supp. 870 (E.D. Pa. 1982); *Hlodan v. Ohio Barge Line, Inc.*, 611 F.2d 71 (5th Cir. 1980); *Grigsby Coastal Marine Service of Texas, Inc.*, 412 F.2d 1011 (5th Cir. 1969), *cert. dismissed*, 396 U.S. 1033 (1970); *Scott v. John H. Hampshire, Inc.*, 246 Md. 171, 227 A.2d 751 (1967); *Wagner v. International Ry. Co.*, 232 N.Y. 176, 133 N.E. 437 (1921). While omission of this question from the instructions does not constitute "plain error" in the same way as the failure to mention the doctrine of rescue, this Rule 51 forfeiture need not work to appellant's detriment on remand, where the presence of reversible error already requires a new trial.

Appellee cannot cite any authority for its proposition that this second aspect of the rescue doctrine is "land based" law unrelated to the doctrine of unseaworthiness. In both *Hlodan* and *Grigsby* the rescuer's claim rested in part upon the unseaworthiness that created the need for a rescue. It is true, as appellee points out, that the *Grigsby* court stated there is no warranty of unseaworthiness to persons coming aboard a vessel because of the unseaworthy condition (i.e., repairmen and the like). 412 F.2d 1011, 1030. To state that this principle applies to a rescuer, however, is to vitiate the rescue doctrine, which the *Grigby* court declined to do. To the contrary, that court went on to find that the rescuer was a "seaman," entitled to a warranty of unseaworthiness on the vessel whose condition created the peril which prompted Grigsby to board for purposes of rescue.

IV

Appellant makes three other assignments of error pertaining to the trial court's instructions. As the case is to be retried, we will treat each point briefly. First, she points to the fact that assumption of risk is not a permissible defense in admiralty under either the Jones Act or an unseaworthiness claim, *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1939), and that to mask an assumption of risk charge in the garb of contributory negligence constitutes reversible error. *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676 (10th Cir. 1981); *Tolar v.*

Kinsman Marine Transit Co., 618 F.2d 1193 (6th Cir. 1980); *Smith v. United States*, 336 F.2d 165 (4th Cir. 1964). In this case, the specific language singled out by appellant in the court's instructions is unobjectionable because it concerns Great Lakes' negligence, not Furka's. However, as the cases cited make clear, the line between contributory negligence and assumption of risk in a maritime setting is a fine one. "[T]he defense of contributory negligence requires evidence of some negligent act or omission by the plaintiff other than his knowledgeable acceptance of a dangerous condition." *Joyce v. Atlantic Richfield Co.*, 51 F.2d 676, 682-683, *citing Rivera v. Farrell Lines, Inc.*, 474 F.2d 255 (2d Cir.), *cert. denied*, 414 U.S. 822 (1973). Here a proper instruction on the rescue doctrine will assist in negating any inference of assumption of risk, but the trial court should take care to distinguish the concepts of "contributory negligence" and "assumption of risk" for the jury.

The trial court's instruction regarding the seaworthiness of the Boston Whaler was proper, though needlessly confused by negatives. In relevant part, the court charged:

> If you find that the defendant did not maintain the Boston Whaler at the dike for the purpose of missions such as the one that Paul Furka had embarked upon just prior to his death, *and* if you further find that he was not ordered to embark upon the mission, but rather that it was his own free choice to do so, then you must find that the Boston Whaler was not unseaworthy. (Emphasis added.)

Appellant objects that the clauses joined by "and" erect a "double hurdle" for the jury in order to find the Boston Whaler unseaworthy; appellee correctly discerns that any "double hurdle" extends to its position here. The jury found the boat to be seaworthy under an adequate instruction.

Finally, appellant assigns as error the trial court's directed verdict for defendant on the issue of punitive damages under her Jones Act claim. It is unclear whether punitive damages

are allowable under the Jones Act,[8] although they appear to be at least theoretically available under general maritime law.[9] We need not reach the issue, since the record contains no evidence to support a finding of "willfull" or "wanton" or "reckless" behavior on the part of Great Lakes that would be necessary to support any punitive damage award. *See e.g., In re Merry Shipping,* 650 F.2d 622 (5th Cir. 1981); *In re Marine Sulphur Queen,* 460 F.2d 89 (2d Cir.), *cert. denied,* 409 U.S. 982 (1972); *United States Steel Corp. v. Fuhrman,* 407 F.2d 1143 (6th Cir. 1969), *cert. denied,* 398 U.S. 958 (1970).

The case is reversed and remanded for further proceedings in accordance with our instructions.

REVERSED AND REMANDED.

---

[8] Two circuit courts have specifically refused to reach the question. *In re Merry Shipping,* 650 F.2d 622 (5th Cir. 1981); *Phillip v. United States Line Co.,* 355 F.2d 25 (3d Cir. 1966). In a third case, the district court held punitive damages recoverable under the Jones Act and awarded them. The Sixth Circuit reversed on the facts without comment on the legal holding. The opinion is unclear as to whether the underlying cause of action on appeal was the Jones Act claim, the unseaworthines claim, or both. *Petition of Den Norske Amerikanje A/S,* 276 F. Supp. 163 (N.D. Ohio 1967), *rev'd sub nom. United States v. Fuhrman,* 407 F.2d 1143 (6th Cir. 1969), *cert. denied,* 398 U.S. 958 (1970).

[9] *See e.g., In re Merry Shipping* (specifically holding punitive damages recoverable under general maritime law "upon a showing of willful and wanton misconduct by the shipowner in the creation or maintenance of unseaworthy conditions," 650 F.2d 622, 623; *In re Marine Sulphur Queen,* 460 F.2d 89 (2d Cir.), *cert. denied,* 409 U.S. 982 (1972); *Renner v. Rockwell International Corp.,* 403 F. Supp. 849 (C.D. Cal. 1978). These cases cite general principles in *The Amiable Nancy,* 3 Wheat. 546 (1818), although, like Justice Story, none of them actually finds punitive damages appropriate in the situation at hand.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-1542

FILED
APR - 5 1985
U. S. Court of Appeals
Fourth Circuit

Deborah Furka, etc.,

Appellant,

versus

Great Lakes Dredge & Dock Company, Inc.,

Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, District Judge.

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Wilkinson, for a panel composed of Judge Russell, Judge Phillips and Judge Wilkinson.

For the Court,

JOHN M. GREACEN
Clerk